No. 10030

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN, GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION, *Appellants,*

vs.

CLARENCE X. BOLLENBACH, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt, *Appellee.*

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

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BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

JURISDICTION

Three of appellants filed an involuntary petition in bankruptcy against West Hills Memorial Park,

a corporation, in the District Court of the United States for the District of Oregon and after trial an order of adjudication and reference was entered on May 23, 1941. (See pages 7, 8 and 2 of record.) On June 30, 1941, at the first meeting of creditors the Honorable Estes Snedecor, referee, declared a failure to elect a trustee and appointed C. X. Bollenback trustee of the bankrupt estate. (Pages 12 and 2 of record.) A petition to review said order was duly filed by appellants (Page 7 of record), the referee filed his certificate on review with the District Court (Page 1 of record) and after hearing, the court entered an order on September 30, 1941 affirming the referee's order (page 20 of record). Within 30 days thereafter notice of appeal from said order was duly filed by appellants (page 21 of record).

STATUTORY PROVISIONS

Section 1 (9) of United States bankruptcy act: "Court" shall mean the Judge or the referee of the court of bankruptcy in which the proceedings are pending (10) Courts of bankruptcy shall include the District Courts of the United States. . . .

Section 2a of the Bankruptcy act: The courts of the United States herein before defined as courts of bankruptcy are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction . . . (2) allow claims, disallow claims. . . . (17) Approve the ap-

pointment of trustees by creditors or appoint trustees when creditors fail so to do.

Sec. 24a. The Circuit Courts of Appeals of the United States. . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy . . . in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse both in matters of law and in matters of fact.

Sec. 38. Referees are hereby invested, subject always to a review by the Judge, with jurisdiction to. . . . (6) perform such of the duties as are by this act conferred on Courts of bankruptcy.

STATEMENT OF THE CASE

At the first meeting of creditors of bankrupt appellants voted 15 claims over $50.00 and a total of $5202.54 in amount for Herbert M. Cole as trustee. For the sake of convenience we shall call said creditors Group A. The only other group of creditors that voted, presented 8 allowed claims over $50.00 and a total, including those under $50.00, amounting to $5288.96. For the sake of convenience we shall call them Group R. The referee held that Group A had a majority in number of claims over $50.00 and Group R had a majority in amount and thereupon declared there was no election and appointed C. X. Bollenbach as trustee.

Group R had presented three claims for voting that were objected to by Group A and the objections were sustained. These were the claims of the managing agent of the bankrupt, the secretary of the bankrupt and the attorney for the bankrupt in the bankruptcy proceedings. Amongst the 8 allowed claims that were voted by Group R was a claim in the sum of $2500.00 by R. N. Kavanaugh, as administrator of the estate of J. P. Kavanaugh, deceased. This claim was objected to by Group A and the objections were overruled by the referee.

The Kavanaugh proof of claim contained the following allegation: "That the consideration of said debt is as follows: Legal services rendered: Between May 1, 1935 and October 1, 1938." (Page 14 of record.) Attached to the claim is the following statement (Page 16 of record)

"WEST HILLS MEMORIAL PARK, a
corporation
to
KAVANAUGH & KAVANAUGH, DR.
Legal services rendered between May 1,
1935 and October 1, 1938........$2,500.00"

No further statement of the consideration upon which the claim is based or itemization of services rendered or particularization of the sums claimed for specific service appears on the proof of claim.

Including the $2500.00 Kavanaugh claim, Group R voted only 8 allowed claims over $50.00 to Group A's 15 claims over $50.00 and therefore Group A clearly had a majority in number of allowed claims

over $50.00. Including the $2500.00 Kavanaugh claim Group R had a total in amount of $5288.96 against $5202.54 of Group A or a greater amount by $86.42. If the Kavanaugh claim had not been allowed to vote Group A would have had 15 claims over $50.00 as against 7 claims over $50.00 for Group R and Group A would have had a total in amount of $5202.54 against $2788.96 for Group R or a greater amount by $2413.58. Clearly, therefore, if the objection of Group A to the right of the Kavanaugh claim to be voted at the first meeting of creditors was well taken, there was an election of Group A's candidate for trustee.

Amongst the claims voted by Group R and allowed by the referee were five claims totalling $1198.53. These together with the powers of attorney through which they were voted, had been executed prior to adjudication. If the objection of Group A to the right of these five claims to be voted was well taken Group A had a majority in amount as well as number even if the Kavanaugh claim were duly proved.

SPECIFICATION OF ERRORS

I.

The Referee erred in overruling the objections of Group A to the right of the Kavanaugh claim to be voted in the election of a trustee.

A. A claim for services as an attorney for a bankrupt should be excluded from voting in the elec-

tion of a trustee.

B. A proof of claim must set forth the particulars and items upon which the consideration is based; else it may not participate in voting or dividends.

C. Claims for legal services are not duly proved and should not be allowed unless the services are specifically itemized in the proof of claim.

II.

The referee erred in permitting Group R to vote claims that were executed prior to adjudication.

III.

The Referee erred in failing to declare the election of Herbert M. Cole as trustee.

IV.

The District Court erred in affirming the order of the referee.

Specification I.

The Referee erred in overruling the objections of Group A to the right of the Kavanaugh claim to be voted in the election of a trustee.

A.

A claim for services as an attorney for a bankrupt should be excluded from voting in the election of a trustee.

AUTHORITIES

Beale vs. Snead, C.C.A. 4th Cir., (Va.) 1936. 81 Fed. (2d) 970, 30 A.B.R.N.S. 443, 565 S. Ct. 956, 298 U.S. 685, 80 L. Ed. 1404, Rehearing denied 57 S. Ct. 5, 299 U.S. 619, 81 L. Ed. 457.

The Circuit Court of Appeals said on page 970:

"As Mr. Catterall's claim was for services rendered the bankrupt as attorney, it was properly excluded from voting in the election of the trustee."

B.

A proof of claim must set forth the particulars and items upon which the consideration is based; else it may not participate in voting or dividends.

AUTHORITIES

Bankruptcy Act, Sec. 57(a), Title 11 U.S.C.A. Sec. 93(a).
U. S. Supreme Court General Order XXI, (1), 11 U.S.C.A. Sec. 53.
6 Am. Jur. page 567, Sec. 90.
8 C.J.S. 1293.
Gilbert's Collier on Bankruptcy (4th Ed.) Sec. 1021, page 758.
U.S.C.A., Title 11, Bankruptcy, Sec. 93, subd. (a), page 222, par. 8. See numerous cases cited under said paragraph.
Vol. 2, Remington on Bankruptcy (4th Ed.) Sec. 721, page 151, Note 7; Secs. 731, 732, 733, 1007.
In re Louis Elting, Inc., D.C.N.Y. 1933, 4 Fed. Supp. 732, 25 A.B.R.N.S. 57.
In re Hudson Porcelain Co., D.C.N.Y. 1915, 225 F. 325.

Wireless Telegraph Co., D.C. Me. 1912, 201 F. 445, 29 A.B.R. 848.
In re Louis Elting, Inc., D.C.N.Y. 4 Fed. Supp. 732, 25 A.B.R.N.S. 57.
In re Scott, 93 F. 418, 1 A.B.R. 553.
In re Creasinger, 17 A.B.R. 538, 1906 (Cal. Ref.).
In re Federal Silk Hosiery, C.C.A. N.Y., 68 F. (2d) 899, point 2.

Bankruptcy Act, Sec. 57(a), 11 U.S.C.A. Sec. 93(a)

"Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor . . ."

U. S. Supreme Court General Order XXI (1),

11 U.S.C.A. Sec. 53, page 28

". . . Depositions to prove debts existing in open accounts shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. . ."

6 Am. Jur. 567

"Care and particularity are required in the preparation of a proof of claim, for it is both the creditor's pleading and his evidence and makes for him a prima facie case. It must be made as provided in the Bankruptcy Act and the Forms prescribed by the Supreme Court, and a proof made in the form of ordinary pleadings, although setting up a good cause of action, is insufficient."

Gilbert's Collier on Bankruptcy (Fourth Edition) page 758.

> "1041. STATEMENT OF CONSIDERATION.—The statement as to consideration must be sufficiently full and explicit to enable the trustee and creditors to investigate as to the fairness and legality of the claim. It must be sufficient to enable the referee passing on it to do so intelligently and judicially. It will not be sufficient to merely state that the consideration was 'for legal services,' or 'for goods, wares and merchandise.' The statement of the claim should be itemized and should set forth the dates of the several items where possible."

Remington on Bankruptcy, Vol. 2 (4th Ed.) p. 156.

> "The proof is the sworn statement by which a creditor presents his claim to the court's consideration; allowance is the judicial action by which the validity and amount of a claim is established for participation in the distribution of dividends and for the purpose of voting at meeting of creditors. Care and particularity are required in the preparation of a proof of claim in bankruptcy, for it is both the creditor's pleading and his evidence and makes for him a prima facie case.
>
> "The court, apparently, has no authority to allow any claims except such as have been 'duly approved.'"

Page 165,

> "ACCOUNT TO BE ITEMIZED.—In carrying out and interpreting the statutory requirement that the consideration must be stated, the Supreme Court has prescribed in its General Order XXI that if the claim is upon an account the account must be in detail, that is to say, be itemized, and be attached to the affidavit. This

is so even in the case of an account for legal services. The items must be dated and described."

In the Matter of Creasinger, 17 A.B.R. 538, quoting from page 545:

"As tested by these rules, it is apparent that the item of $605.95 in the claim of C. L. Shinn, and the item of $2,974.90, made up of $2,753.55, in the name of E. C. Hine, and $221, part of the $700.30 claim of C. L. Shinn, cannot be approved. The statement of the consideration is not sufficiently specific and full to enable the trustee or creditors to pursue any proper and legitimate inquiry as to the fairness and legality of that claim. The claims are so meagre and general in their character that they must clearly be held insufficient. It is not even apparent therefrom whether the claim is upon an express contract for a specific amount of money which was agreed to be paid by the bankrupt to Messrs. Shinn for their services, or whether it is upon an implied contract for the reasonable value of such services. It does not even appear that the services were reasonably worth the amount alleged to be charged therefor.

"The statement of the consideration ought to be such as, if true, not to put the creditors or trustee upon proof, or require oral explanation from the claimants. It is no answer to this position that it would thereby become incumbent on the part of the claimants to state the testimony upon which he relies to support his claim. The law requires it; creditors and trustees are entitled to it. The proof of claim is not a pleading; it is a deposition which must set forth the evidence with particularity."

In re Hudson Porcelain Co., 225 F. 325.

Frank E. Parham filed a proof of claim against the bankrupt's estate based on legal services. The claim was objected to for want of sufficient statement of the claim and the consideration therefor. The court, commencing on the bottom of page 326, states:

> "In addition, the statute (section 57d) provides that 'claims which have been duly proved shall be allowed,' unless objections are interposed, etc. Claims which do not comply with the requirements of the statute are not 'duly proved.' They are not, therefore, entitled to allowance."

Also on the bottom of page 327,

> "This is but a general statement that the consideration of the debt is for legal services rendered during a certain period of time, without specifying the nature of the matters in which they were rendered, whether in litigation or what, except in the one particular of the preparation of the schedules to be filed in this bankruptcy proceeding. It does not specify the dates or the number of times the claimant appeared for the corporation at Trenton, or the purpose thereof. It is silent as to the amount of time given by the claimant to the affairs of the corporation. It fails to state whether the amount claimed was agreed upon between the claimant and the corporation, or whether the amount which he claims is what he considers the services reasonably worth. In short, it affords the trustee and the creditors no means of making a proper investigation to ascertain whether the amount claimed is fair and reasonable or what services were actually rendered."

To allow this lumped claim is to violate the authorities cited and the very reason for the rule. This \$2,500.00 claim which was insufficient in content to form the valid basis of a proved claim constituted almost one-fourth of the total amount that the referee allowed to vote. If the whole of it were eliminated from voting, Group A would have had a majority in both number and amount by about 100%. If the requirement of itemization would have reduced the claim by only \$86.43 and the claim were otherwise properly votable, Group A would still have had the necessary majority in number and amount. The law against lumping of claims for evidenciary purposes should be retained.

C.

Claims for legal services are not duly proved and should not be allowed unless the services are specifically itemized in the proof of claim.

AUTHORITIES

See cases cited under specification 1 B.

Specification II.

The referee erred in permitting Group R to vote claims that were executed prior to adjudication.

Following are the claims voted by Group R which, together with powers of attorney, were executed prior to May 23, 1941, the date of adjudication:

Oregon Door Co.	$75.00
Enterprise Planing Mill Co.	163.74
Honeyman Hardware Co.	157.04
J. K. Gill Co.	76.55
Oregon Brass Works	726.20
	$1198.53

The chief reason for denial of the right to vote claims which, together with powers of attorneys, are executed prior to adjudication is one of public policy. An alleged bankrupt who contests involuntary bankruptcy proceedings may very well use the period of contest as a breathing spell within which to direct the claims of many creditors into channels that will be favorable to it or him when bankruptcy occurs. Until he files his schedules he alone knows who and where all his creditors are. While petitioning creditors are bearing the burden of the proceedings against alleged bankrupt for the benefit of all creditors, excellent opportunity is afforded for the bankrupt to line up creditors for an apparently neutral or disinterested person as trustee. In most involuntary cases thorough investigation of bankrupts and the prosecution of suits to set aside preferences or fraudulent conveyances are essential for the best interests of creditors and good business ethics. Energetic investigation and proper prosecution of suits by a trustee will often be abnormally tempered by the consciousness of having been elected trustee through the efforts of the prosecutee. Nor should persons on the sidelines while the involuntary proceedings are being fought be given opportunity

in the meantime to line up claims and powers of attorney for themselves to gain the fees of liquidation. There should be no scramble for the corpse before the body is declared dead. It may be significant in this case that the manager of bankrupt, its secretary and its attorneys attempted to vote with Group R in this case. In any event the same good policy forbidding attorneys for bankrupt to vote at elections of trustees (Beale vs. Snead, supra) should also prevent the voting of claims and powers of attorney executed prior to adjudication.

Specification III.

The referee erred in failing to declare the election of Herbert M. Cole as trustee.

AUTHORITIES

In re Federal Silk Hosiery Works, Inc., supra.

In this case the referee declared that one group of creditors voted a majority in number of claims and another group voted a majority in amount and that there was no election. Upon review to the District Court the referee was affirmed but the Circuit of Appeals held that the objection to one of the claims should have been sustained and thereupon an election declared. The Court states on page 900:

> "It seems evident from the record that the details showing a proper basis for the claim of

> Clara Rosenthal were not furnished either in her proof of claim or in any evidence submitted to the referee or to the District Judge."

No question has or could properly be raised as to the qualifications of Mr. Cole for the trusteeship. He is especially well qualified in that he became thoroughly familiar with the complicated and detailed facts concerning bankrupt while representing the petitioning creditors in the trial on the involuntary proceedings.

Specification IV.

The court erred in affirming the order of the Referee.

The reasons heretofore given for errors on the part of the Referee apply likewise to the order of the District Court which affirmed the Referee but the court's opinion (page 17 of record) contains statements with which we beg to differ.

Paragraph XII of the petition to review (page 11 of record) states as follows:

> "That petitioners objected to the voting of the claim presented by R. N. Kavanaugh, among other reasons, on the ground that said claim was not properly itemized and that the consideration therefor was not sufficiently set forth."

The Referee's certificate (page 2 of record) states:

> "The facts stated in the petition for review are substantially correct, except in the following particulars."

No exception is made to said paragraph XII of the petition to review. However, in the top paragraph on page 6 of the record appears an explanation by the Referee as to his ruling on the Kavanaugh claim. He states that:

> "Mr. Lenske admitted that he knew that Judge Kavanaugh had rendered valuable services to the bankrupt several years ago but that he was of the opinion that the amount asked was too large."

The opinion of an attorney even if construed as an admission is not a determining factor in the validity of a bankruptcy Proof of Claim. The Proof of Claim must stand on its own ground. The opinion or knowledge of an attorney or even the Referee should not and cannot legally make up for a deficient Proof of Claim. It is the duty of the Referee to disallow on his own motion and without objection Proofs of Claim that do not show in detail the consideration upon which they are based. See Remington, Vol. 2, 4th Ed., Sec. 1007.

The Referee proceeds further in his explanation and states:

> "Mr. Kavanaugh stated that statements had been rendered to the bankrupt for this amount over a period of years and that it had not been questioned by the bankrupt."

In the District Court's opinion, it is stated:

> "Where the claimant is present at the meeting to elect a trustee and prepared to support the claim, it is not error for the Referee to allow

it for voting purposes, even if the original Proof of Claim be somewhat informal."

The court does not give sufficient weight to the decisions hereinbefore cited. Failure to set forth the consideration in detail is a failure to make the necessary Proof. It is a failure to present sufficient testimony to make a prima facie case. It is an attempt to rely upon a pleading in lieu of evidence. This is a failure in substance and not merely in form.

Furthermore, the facts do not bring this case within the decision in re Louis Elting, Inc., Supra. In that case the claimant himself was present and not his Administrator. There is a difference between an obligee being present and offering to give the facts concerning his services and an administrator or an assignee being present. However, the administrator, R. N. Kavanaugh, did not offer to testify under oath and supply the necessary detailed information. Nor does the referee state that he did. The Referee's explanation merely states:

> "Mr. Kavanaugh stated that statements had been rendered to the bankrupt for this amount over a period of years and that it had not been questioned by the bankrupt."

The statement was not made under oath and it merely attempts to circumvene the requirement that detailed information be given in support of a claim for legal services. If the court should choose to follow the Elting case against the vast array of cited

authorities, the Elting case ruling should not be extended.

The court's opinion also states (page 19 of record):

> "Furthermore, the record on the trial of the insolvency petition will show that the petitioners introduced testimony as to the validity and amount of this claim in order to show insolvency"

and added that this did not create an estopel. Truly, the fact that petitioning creditors called upon various claimants to testify concerning their claims in the determination of the total amount of indebtedness of the company would not determine the validity or amount of such claim for allowance. On the contrary, it may very well be that after hearing a witness testify as to his claim on the issue of insolvency, a creditor might determine that such claim should be objected to on account of the weakness or inconsistency of the testimony adduced. If what had previously occurred in that respect should be considered, greater reason exists for holding in this case that the claimant should have made available in court a Proof of Claim in writing showing in detail the services rendered and the respective amounts charged for such services. The claimant is an attorney. The decisions requiring particular care in the preparation of a Proof of Claim should be no less binding upon an attorney than a layman.

The District Court also states in its opinion that under the Oregon law:

> "The circumstances indicated that this constituted an account stated."

The case cited in the court's opinion, Steinmetz vs. Grennon, 106 Ore. 625, 212 Pac. 532, certainly would not change the substantive law herein cited under Specification II B. Not only in Oregon but throughout most states a promise to pay for merchandise or services may be either express or implied. Nevertheless, a Proof of Claim in Bankruptcy must set forth in detail the consideration for the liability. It is even held that the consideration for a note, which in and of itself imports a consideration, must be set forth in the Proof of Claim. See Remington, Vol. 2, 4th Ed. Sec. 731.

CONCLUSION

For the reasons given in the Assignments of Error set forth, the orders of the referee and the District Court should be reversed and the candidate of Group A should be declared duly elected trustee of the above entitled estate.

Respectfully submitted,

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